93-1591

Supreme Court, U.S.
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NO. _____

UNITED STATES SUPREME COURT

October Term, 1993

JOSE DELGADO GARCIA and SONYA DELGADO,

Petitioners

V.

FEDERAL DEPOSIT INSURANCE CORPORATION, RECEIVER FOR FIRST CITY, TEXAS-HOUSTON, N.A. F/K/A/ FIRST CITY NATIONAL BANK OF HOUSTON-McALLEN; NEW FIRST CITY, TEXAS-HOUSTON, N.A., ITS TRANSFEREE, TEXAS COMMERCE BANK NATIONAL ASSOCIATION, and GLENN W. TIMMONS,

Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNSEL OF RECORD FOR
RESPONDENT TEXAS COMMERCE
BANK NATIONAL ASSOCIATION

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QUESTIONS PRESENTED

Respondent disagrees with the assertion of Petitioners that the state trial court employed devices unknown and unauthorized under state law to dispose of a lawsuit; therefore, Respondent disagrees that a constitutional issue involving the Fourteenth Amendment to the United States Constitution is presented.

Similarly, Respondent disagrees with the statement of Petitioners that this case did not qualify to be placed on the summary calendar under the rules of the federal court of appeals; therefore, Respondent does not believe that Petitioner's second question is fairly presented under the facts of this case.

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OPINIONS BELOW

The statement of Petitioner as to opinions below is substantially correct except insofar as it infers that the judgment in favor of First City, Texas - Houston, N.A. against Petitioners in the sum of $50,000 was a judgment on anything other than the evidence presented.

STATEMENT OF THE CASE

Petitioners as Plaintiffs filed this lawsuit in the 370th District Court of Hidalgo County, Texas, claiming damages from the Defendants named therein by reason of the Defendants' alleged violations of the Texas Deceptive Trade Practices Act, fraud, breach of contract, and intentional and negligent infliction of emotional harm. The Defendant, First City, Texas - Houston, N.A. (sometimes referred herein as "First City"), counterclaimed for indebtedness owing by Plaintiffs to that Defendant represented by a $50,000 note. Plaintiffs claimed on appeal that they pleaded affirmative defenses of failure of consideration, breach of contract, fraud and homestead. Breach of contract and fraud were also

pleaded by Plaintiffs as causes of action against Defendants.

The case went to trial on the merits. Plaintiffs presented their evidence over a span of four days and rested. The evidence did not show that First City refused to give Plaintiffs the full $50,000. To the contrary, the evidence conclusively showed that Plaintiffs had received the entire $50,000, this by Plaintiffs' own admission from the stand, and that none of the $50,000 had been repaid.

Plaintiffs during the four-day jury trial offered evidence in support of their alleged causes of action against, among others, First City. After Plaintiffs rested, the trial court heard Defendants' motions for judgment: (1) that the Plaintiffs having failed to

offer legally sufficient evidence in support of their alleged causes of action take nothing as to such alleged causes of action; and (2) that the evidence offered showing conclusively that Plaintiffs had received the $50,000 agreed to be loaned them and not having repaid same that First City recover the principal sum of $50,000 loaned by it to Plaintiffs. The court gave Plaintiffs full opportunity to present to the court both by way of argument and further evidence why the court should not grant such motions of First City; however, Petitioners elected to stand upon their record which included evidence admitting execution of the note held by First City and of receiving the consideration for such note. First City did not seek foreclosure nor did the judgment order same.

In Petitioner's Statement of the Case, Petitioners quote Respondent's trial counsel as stating, "Yes, Your Honor. I've got a counterclaim. And at this time I move for judgment on the pleadings if I may." There was more to this statement than quoted. It continued in this manner: "The pleadings on behalf of Mr. Delgado and the testimony from Mr. Delgado and the testimony from Mr. Timmons, there is no question that he received the $50,000. So I move for judgment on the $50,000. There is a judicial admission in their pleadings in their Plaintiff's First Amended Petition that the only thing that Mr. Delgado paid was two interest payments...." [Statement of Facts, Volume V, page 632, lines 7-13].

The court responded: "Well, what you're asking a judgment on at this time, does the evidence before the court include that? Verify and prove that." [Statement of Facts, Volume V, page 632, lines 23-25]. The court went on and said: "I'm trying to ask you if there was any evidence before the court that your judgment against the Plaintiff should be satisfied?" [Statement of Facts, Volume V, page 633, lines 2-4]. Counsel for the Respondents answered, "Yes, Your Honor, there is plenty of evidence...." [Statement of Facts, Volume V, page 633, lines 5-6]. There was other discussion between the court and counsel for the Respondents regarding the nature of the evidence including Respondent's claim of judicial admission in the pleadings after which, Petitioner's trial counsel made

the objection quoted in its Petition for Writ of Certiorari (page 5). On several occasions the court stated that the court was going to let counsel for the Petitioners tell the court why the motion for judgment for $50,000 should not be granted. After more argument, the court finally said, "All right. Anything else?" [Statement of Facts, Volume V, page 639, line 4] to which counsel for Petitioners responded, "We stand on our previous arguments...." and after which the court then said, "Nothing further offered, the defense motion on their cross-action for the amount of the note, original amount of the note, $50,000 is granted, only. Anything else?" [Statement of Facts, Volume V, page 639, lines 14-18]. The trial proceeded before

the jury on the question of attorney's fees.

SUMMARY OF ARGUMENT

The trial court did not employ devices unknown and unauthorized under state law to dispose of a lawsuit. The motions for judgment were recognized by counsel and the court as such; and counsel for Petitioners had been accorded opportunity to go forward with the evidence if they desired to do so. In short, Petitioners were not denied the opportunity to fully develop their case. The fact is, they had already done so.

Neither were Petitioners denied due process when the Fifth Circuit Court of Appeals declined to write an opinion. The Fifth Circuit followed its rule finding that the judgment of the district court was based on findings of facts

which were not clearly erroneous. However, for purposes of argument, even if the Fifth Circuit did not strictly follow its rule, such failure did not result in denial of due process to Petitioners. Petitioners were accorded full opportunity to present their appeal, and they did so. The judgment was one of affirmance. Failure to write an opinion did not deny Petitioners any further right to seek reconsideration or prosecute this writ.

ARGUMENT

The standards of due process applicable to this case are clearly stated in *Fuentes v. Shevin*, 407 U.S. 67, 32 L.Ed.2d 556, 92 S.Ct. 1983 (1972) wherein it is stated that parties whose rights are to be affected are entitled to be heard, and that this opportunity to be

heard must be granted at a meaningful time and in a meaningful manner. The complaint of Petitioners is that their opportunity to be heard was not conducted in a meaningful manner.

Petitioners were Plaintiffs in the trial court. They presented their evidence in support of their claims under the Texas Deceptive Trade Practices Act, their claims that Respondents acted fraudulently, their claims that there was a breach of contract, and their claims that the Respondents inflicted emotional harm upon them. In doing so, they also presented evidence of their indebtedness, acknowledged their receipt of all funds, acknowledged their non-payment of principal and that the principal indebtedness was past due and unpaid. They now complain that at the close of

their presentation of evidence, Respondents moved for and the court granted motions for judgment that the Plaintiffs take nothing on their asserted causes of action, and, the indebtedness having been fully proven and the evidence showing that Plaintiffs had no valid defenses thereto, that Defendants recover their principal.

What the attorney for the Defendants called his motion is not important. Texas courts look to substance and not to form. *State Bar of Texas v. Heard*, 603 S.W.2d 829, 833 (Tex. 1980); *Arabian Shield Development Co. v. Hunt*, 808 S.W.2d 577, 584 (Tex. App. -- Dallas 1991, writ denied). The basis for the judgment requested was clearly stated and it was based on more than just the pleadings. It was based on testimony of named witnesses and the other evidence

presented. Counsel for Plaintiffs should not and were not misled. Certainly, the court was not.

Petitioners have not shown that the court at any time refused a proffer of evidence on any subject, claim or affirmative defense. In fact, the record shows that the court offered Petitioners every opportunity both by way of argument and additional offer of evidence but that Petitioners declined. Petitioners have not shown that at any time during the proceedings any offer of additional evidence relating to defenses was offered, much less, refused.

Considering the affirmative defenses, it is understandable why the Plaintiffs did not make an additional offer. Plaintiffs themselves had testified to the contract, to its

acceptance, to the acceptance of the monies, and to the non-repayment of those monies. They had disproved by their own evidence that there was any affirmative defense based on breach of contract or failure of consideration. The only affirmative defense which might have been offered was rendered irrelevant. The defense of homestead would apply only if Respondents sought to enforce a lien against the claimed homestead property. They did not.

In short, it is impossible to see how Plaintiffs can claim to have been denied a full and fair hearing of both their claims and defenses.

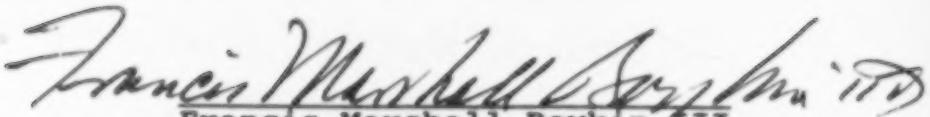
The state trial court held as a matter of law that under the evidence presented there was no issue to go to the jury except for attorney's fees. That

issue was presented to the jury and the jury found against Respondents. Respondents have not complained of that finding. This seems to clearly meet one of the criteria required by Local Rule 47.6 of the United States Court of Appeals for the Fifth Circuit. It appears clear that the Court of Appeals deemed the judgment of the district court to be based on findings of fact which were not clearly erroneous. Even so, Petitioners were not denied a fundamental right of due process. They had a full and fair hearing both at the trial and on appeal. It was meaningful in time and manner and, therefore, did not deny the Petitioners any fundamental right of due process.

CONCLUSION

It is respectfully submitted that the Petition for Writ of Certiorari should be denied. The United States Court of Appeals did not so far depart from accepted and usual course of judicial proceedings, nor did it sanction such a departure by the lower court as would result in denial of due process to Petitioners or as would call for an exercise of this Court's power of supervision. The Court of Appeals correctly held the findings of fact and conclusions of law of the trial court were not clearly erroneous and in doing so upheld a decision in which Petitioners were accorded the full measure of due process owing them.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Francis Marshall Boykin III, a member of the Bar of the Supreme Court of the United States and counsel of record for Texas Commerce Bank National Association, Respondent herein, hereby certifies that, pursuant to Rule 29.3, Rules of the Supreme Court, I served three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari on each of the parties herein, as follows:

On Jose Delgado Garcia and Sonya Delgado, Petitioners herein, by depositing such copies in the United States post office or mail box in Corpus Christi, Texas, with first class postage prepaid, properly addressed to the post office address of Patricia Alvarez, One

Park Plaza, Suite 510, 100 E. Savannah, McAllen, Texas 78503; (210) 971-9446.

On Federal Deposit Insurance Corporation, Receiver for First City, Texas-Houston, N.A. f/k/a First City National Bank of Houston - McAllen, by depositing such copies in the United States post office or mail box in Corpus Christi, Texas, with first class postage prepaid, properly addressed to the post office address of Chris Bellotto, Federal Deposit Insurance Corporation, 550 17th Street N.W., Room 4018, Washington, D.C. 20429; (202) 898-7274.

On Glenn W. Timmons, by depositing such copies in the United States post office or mail box in Corpus Christi, Texas, with first class postage prepaid, properly addressed to the post office address of Edmundo O. Ramirez, 901 Texas

Commerce Bank, Neuhaus Tower, McAllen, Texas 78501; (210) 682-2440.

New First City, Texas - Houston, N.A. is not a party hereto, Texas Commerce Bank National Association having been substituted therefor in the Court of Appeals.

All parties required to be served have been served.

Signed this 6th day of May, 1994.

Francis Marshall Boykin III

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